

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

DEANDRE MARQUIS ROGERS,

Defendant and Appellant.

C083426

(Super. Ct. No. 14F00483)

A jury found defendant Deandre Marquis Rogers guilty of carrying a concealed weapon in a vehicle and found true the allegation that defendant committed his crime for the benefit of a street gang. Defendant later pleaded no contest to assault with a firearm and the trial court sentenced him to an aggregate term of six years in state prison.

On appeal, defendant contends the trial court abused its discretion in denying his motion to sever, he received ineffective assistance of counsel, and the evidence at trial was insufficient to support imposition of the gang enhancement. Finding none of his claims to have merit, we affirm the judgment.

## **I. BACKGROUND**

### **A. *May 2013 Crimes***

In the early afternoon on May 11, 2013, Latosha was with her friend, Axiel, at a park in Sacramento. They heard a car screeching; the car stopped in front of the park. Three or four “black men” jumped out of the car and yelled, “SS” or “SUS,” and “don’t move.” (“SS” stands for Starz shooter, which identifies someone as being from Oak Park and “SUS” stands for “Stick Up Starz.”) Each of the men had a gun and began shooting at Latosha and Axiel. Axiel was shot but was able to run away. Latosha was shot 12 times. Both survived but with lingering effects.

Nearly two weeks later, Detectives Houston and Ellis interviewed Latosha. Latosha told them that three black men she had never seen before jumped out of the car, and each of them had a handgun. Latosha told Detective Houston that she had not heard who may have done this. Latosha was shown a photographic line up, and she identified defendant as someone who looked like the person who shot her.

### **B. *June 2013 Crimes***

Around 3:00 p.m. on June 13, 2013, Sacramento City Police Officer Shaun McGovern and his partner, Officer Chin, conducted a traffic stop on a white minivan. Defendant was driving and Lee Anna was in the front passenger seat. Directly behind defendant, in a car seat, was Lee Anna and defendant’s minor child. Next to their child, also secured in a car seat, was a second infant. In the third row of the minivan, on the passenger side, sat Jordan Haywood, an adult, and two other passengers. A two-year-old was walking around inside the minivan.

On the floorboard directly behind the driver’s seat was a diaper bag. Inside that diaper bag was a loaded .40-caliber semiautomatic handgun and Lee Anna’s wallet. Underneath the third row bench seat on the passenger side was a black Air Jordan shoebox. Inside that shoe box was a loaded 9-millimeter semiautomatic handgun. Inside

the trunk were 12 rounds of 9-millimeter ammunition. Defendant was not the registered owner of the handgun found in the diaper bag.

*C. Charges and PreTrial Motion to Sever*

In a single charging document, the People charged defendant with the attempted murder of Axiel (Pen. Code, §§ 664/187, subd. (a)—count one),<sup>1</sup> the attempted murder of Latosha (§§ 664/187, subd. (a)—count two), and carrying a concealed weapon in a vehicle (§ 25400, subd. (a)(1)—count three). The People alleged, as to the attempted murder charges, that defendant intentionally and personally discharged a firearm. (§ 12022.53, subd. (d).) As to the firearm possession, the People alleged the firearm was loaded and defendant was not the registered owner. (§ 25400, subd. (c)(6).) As to all three counts, the People alleged defendant committed the crimes for the benefit of the GMobb criminal street gang. (§ 186.22, subd. (b)(1).) Defendant pleaded not guilty to the charges and denied the allegations.

Prior to trial, defendant moved to sever the firearm possession charge from the attempted murder charges. He argued the offenses were unconnected, there was a disparity in the gravity of the offenses, and the evidence was not “cross-admissible.” The People opposed defendant’s motion. They argued the charges involved the same class of crimes, both incidents involved firearms, and the gang evidence was cross-admissible. The trial court deferred ruling until holding an Evidence Code section 402 hearing, at which Detective Joseph Ellis could testify about the evidence he relied on to reach his expert opinion as an expert on gangs and gang activity.

At that evidentiary hearing, Detective Ellis testified about the active rivalry between the GMobb and the Oak Park Bloods in and around February and June 2013. He testified about defendant’s gang tattoos and his role in rap videos posted to YouTube

---

<sup>1</sup> Undesignated statutory references are to the Penal Code.

during that time, videos that disrespected the Oak Park Bloods and increased tension between the rival gangs. In at least one video, defendant and several validated gang members were seen “pushing their gang,” “talking about shooting people[ and] robbing people . . . .”

Detective Ellis said “word was going around” that defendant was the shooter at the park on May 11, 2013, so any young member of the Oak Park Bloods would gain instant respect if they were to shoot defendant. Defendant would, Detective Ellis opined, have likely felt unsafe and carried a gun to protect himself.

He also described the June 13, 2013, encounter between defendant and the police as “pretty important” to the preparation of his expert opinion. As Detective Ellis explained, that day, defendant was stopped by police. Haywood, another known gang member, was with defendant, and both he and defendant were armed with guns. It was irrelevant to his opinion that defendant’s family also was with him.

The court denied defendant’s motion. The court found the detective’s evidence would be cross-admissible between the attempted murder charges and the gun possession charge. The court acknowledged the attempted murder charges were more serious than the firearm possession but found the probative value of the evidence related to the firearm possession and the gang allegations outweighed any prejudice.

#### *D. Trial*

At trial, Latosha testified that defendant did not shoot her. She said that during the investigation she told police defendant shot her because that was what other people told her. She actually could not identify any of the shooters. She also testified that when she was being interviewed by the detectives she was taking medications that made her feel “crazy,” made her hear voices and see things that were not there.

Detective Ellis testified as an expert in gangs, in particular the GMobb gang and its subsets. He testified generally that gangs protect their territory. Gangs also want to have a reputation for being violent, engaging in crimes, and fighting other gangs.

Individual gang members want respect within their gang and want to be known as someone willing to commit crimes. The best way to gain such a reputation, according to Ellis, is through fear and intimidation. The more crimes a gang member commits, the more respect they acquire.

Detective Ellis testified there was an active rivalry between the Oak Park Bloods and the GMobb gangs. The intensity of the rivalry was the result of rap videos posted on the internet by the GMobb, videos that disrespected the Oak Park Bloods. Defendant was one of the biggest rappers associated with the GMobb and he was in some of the videos disrespecting the Oak Park Bloods and promoting the GMobb and its affiliates. The videos were causing “real world problems, real violence . . . .” There also were pictures on Haywood’s cell phone of Haywood and defendant together, “throwing up” gang signs. Defendant had tattoos associated with Stick Up Starz and the GMobb. In Detective Ellis’s expert opinion, defendant was a member of the GMobb gang.

Presented with a hypothetical, Detective Ellis opined that if two loaded firearms were found in a vehicle with two gang members who had an active rivalry with another gang, the possession of the firearms would be committed for the benefit of, at the direction of, or in association with a gang and with the specific intent to promote, further, or assist in criminal conduct by gang members. It would not matter that there were children in the car; having children in the car will not stop someone from shooting at the gang members in the car, nor will it stop the gang members from shooting a rival if possible. Gang members gain respect by carrying guns.

Defendant testified on his own behalf; he admitted to being a member of the Guttah criminal street gang, which is part of the GMobb gang. He acknowledged making and posting videos disrespecting the Oak Park Bloods. Defendant denied being involved in the May 2013 shooting.

Defendant also testified that on June 13, 2013, while driving the minivan, he was carrying the .40-caliber firearm. As he was pulled over, he gave the gun to Lee Anna and

she put it in the diaper bag. Defendant said he was armed because Detective Ellis told defendant's mother that Oak Park Blood gang members were going to kill her.

*E. Verdict and Subsequent Proceedings*

The jury found defendant guilty of possessing a concealed firearm in a vehicle and found true the allegation that he possessed the firearm for the benefit of a street gang.<sup>2</sup> The jury hung on the charges of attempted murder and the court declared a mistrial on those charges. Defendant was tried a second time on the attempted murder charges, and again the jury could not reach a verdict. The court declared another mistrial.

In October 2016, the People filed a second amended information. In the second amended information, the People dismissed the charges for attempted murder and, instead, charged defendant with two counts of assault with a firearm. (§ 245, subd. (a)(2).) Defendant pleaded no contest to one count and the trial court dismissed the remaining count on the People's motion. The court sentenced defendant to six years in state prison: two years for the concealed firearm possession in a vehicle, three years for the gang enhancement, and one year for the assault (to be served consecutively).

## **II. DISCUSSION**

*A. Motion to Sever*

Defendant first contends the trial court abused its discretion in denying his motion to sever the trial on the attempted murder charges from the charge for firearm possession. He argues the evidence was not “cross-admissible,” the firearm possession case was “weaker” than the attempted murder case, and trying them together caused a prejudicial “spillover” effect that rendered the trial fundamentally unfair and violated his constitutional rights. We are not persuaded.

---

<sup>2</sup> The abstract of judgment incorrectly indicates this conviction was the result of a plea. We will order the abstract corrected on this point.

Section 954 partly provides: “An accusatory pleading may charge two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses, under separate counts . . . .” Whenever such offenses are joined together, however, the court, “in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.” (*Ibid.*)

For purposes of section 954, the phrase “connected together in their commission” is broadly construed. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1218 (*Alcala*)). The requirement may be satisfied even though “ ‘the offenses charged “do not relate to the same transaction and were committed at different times and places . . . against different victims.” ’ ” (*Ibid.*, italics omitted.) Under such circumstances, joinder is proper “ ‘if there is a common element of substantial importance in their commission . . . .” ’ ” (*Ibid.*, italics omitted.)

Defendant concedes the requirements for joinder were satisfied in this case. When there is no dispute that charges have been properly joined in a single information, cross admissibility is not required. (§ 954.1; *People v. Thomas* (2011) 52 Cal.4th 336, 350.) “The burden is [then] on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citations.]” (*People v. Soper* (2009) 45 Cal.4th 759, 773 (*Soper*)).

On appeal, “[a] defendant, to establish error in a trial court’s ruling declining to sever properly joined charges, must make a ‘ “clear showing of prejudice to establish that the trial court abused its discretion . . . .” ’ ” (*Alcala, supra*, 43 Cal.4th at p. 1220, and cases cited.) A trial court’s denial of a motion to sever properly joined charged offenses amounts to a prejudicial abuse of discretion only if that ruling “ ‘ “ ‘falls outside the bounds of reason.’ ” ’ ” (*Ibid.*) We have observed that ‘in the context of properly joined offenses, “a party seeking severance must make a stronger showing of potential

prejudice than would be necessary to exclude other-crimes evidence in a severed trial.” ’ (Id.[ ] at p. 1222, fn. 11, [citation].)” (*Soper, supra*, 45 Cal.4th at p. 774.)

“In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, ‘we consider the record before the trial court when it made its ruling.’ ” (*Soper, supra*, 45 Cal.4th at p. 775.) As relevant here, a trial court’s refusal to sever may be an abuse of discretion where “certain of the charges are unusually likely to inflame the jury against the defendant; [and] a ‘weak’ case has been joined with a ‘strong’ case, or with another ‘weak’ case, so that the ‘spillover’ effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges . . . .” (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173.)

Defendant contends “the firearm case represented a classic ‘weak’ count, joined with the ‘strong’ and ‘inflammatory’ counts of attempted murder.” Thus, he argues, “[t]he violent ‘spillover’ effect from the shooting and injuries of May 11, 2013[,] would likely prejudice a reasonable juror into convicting on the weak evidence of the firearm count.” This contention is not supported by the record.

At the evidentiary hearing on defendant’s motion to sever, Detective Ellis testified that on June 13, 2013, defendant was stopped by police. Haywood, another gang member, was with defendant and both men were armed with guns. Accordingly, on this record, the charge for firearm possession was supported by substantial evidence. So it cannot be that the charges of attempted murder were used to strengthen a weak case for concealed possession of a firearm in a vehicle.

Additionally, while charges of attempted murder generally may be more serious than a charge of firearm possession, in this context the charges were not so “unusually likely to inflame the jury against the defendant.” (*People v. Sandoval, supra*, 4 Cal.4th at p. 172.) Not only was the evidence in support of the firearm charge substantial, but the charges of attempted murder would likely not be particularly more disturbing to a juror



than the evidence that defendant was an active gang member, fanning the flames of discord between rival street gangs, and driving around with loaded firearms.

In sum, we find the court acted within its discretion in denying defendant's motion to sever.

*B. Assistance of Trial Counsel*

Defendant next contends he received ineffective assistance of counsel at trial because his attorney failed to move for acquittal on the charge of firearm possession at the close of the People's case. We disagree.

“ ‘A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.’ [Citations.] ‘First, the defendant must show that counsel's performance was deficient.’ [Citations.] Specifically, he must establish that ‘counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.]” (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) “In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim.” (*Id.* at p. 217.) Moreover, on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective-assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

“In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, ‘ “whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.” [Citations.]’ [Citation.] ‘Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the

sufficiency of the evidence is tested as it stood at that point.’ ” (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.)

The trial court, using CALCRIM No. 2521, instructed the jury that to prove possession of a concealed firearm in a vehicle, the People had to prove “1. The defendant carried within a vehicle a firearm capable of being concealed on the person; [¶] 2. The defendant knew that the firearm was in the vehicle; [¶] 3. The firearm was substantially concealed within the vehicle; and [¶] 4. The vehicle was under the defendant’s control or direction.” Defendant argues that at the close of the People’s case-in-chief, there was no evidence defendant knew the gun was in the diaper bag or that he had a right to control the bag’s contents.

On the contrary, the People presented substantial evidence from which a reasonable juror could find defendant knew the gun was there and had a right to control it. First, the diaper bag containing the gun was behind the driver’s seat and defendant was driving. (See, e.g., *People v. Jenkins* (1979) 91 Cal.App.3d 579, 584 [inference of dominion and control easily made when weapon discovered in defendant’s automobile]; see also *People v. Nieto* (1966) 247 Cal.App.2d 364, 368 [gun found under driver’s seat of the defendant’s car while defendant was driving found to be, “at the very least,” circumstantial evidence of “joint or constructive possession, custody or control of the guns”]; *United States v. Lochan* (1st Cir. 1982) 674 F.2d 960, 966 [“Drivers generally have dominion and control over the vehicles that they drive”].)

Second, Detective Ellis testified that, in his expert opinion, defendant was a member of the GMobb gang. And, according to Detective Ellis, gang members regularly carry guns to gain respect. Third, Haywood, seen in photos with defendant “throwing up” gang signs, also was in the minivan. He too had a loaded gun within his reach. In sum, there was sufficient evidence at the close of the People’s case from which a reasonable juror could find defendant knew the gun was in the diaper bag and had the right to control the gun.

Because the People presented sufficient evidence to convince a rational trier of fact that on June 13, 2013, defendant possessed a concealed firearm in a vehicle, we conclude defendant's trial counsel could reasonably have believed a motion for acquittal would be futile. Trial counsel are not required to make futile motions. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1024 [defense counsel are not required to make futile motions to appear competent].)

*C. Gang Enhancement*

Section 186.22, subdivision (b)(1) imposes an additional term of imprisonment on “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” For purposes of this sentence enhancement, a “criminal street gang” is defined as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.” (§ 186.22, subd. (f).)

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither

reweighs evidence nor reevaluates a witness's credibility.' ” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

Defendant contends there is no substantial evidence he committed the crime of possessing a firearm for the benefit of a street gang. Specifically, he argues, that because there was evidence he may have been carrying the gun for protection and not to “broadcast his allegiance” to gang rivals, that no jury could conclude beyond a reasonable doubt that he was carrying the gun for the benefit of a street gang. We are not persuaded.

Here, Detective Ellis was given the following hypothetical: If two loaded firearms were found in a vehicle with two gang members whose gang had an active rivalry with another gang, would those guns be possessed for the benefit of the gang? It was Detective Ellis's expert opinion that, under those circumstances, the guns would be held for the benefit of the gang.

Defendant admitted to being a member of the GMobb gang and he admitted to carrying the gun on June 13, 2013. Detective Ellis testified extensively about the active rivalry between GMobb and the Oak Park Bloods in and around June 2013. He also described in detail, defendant's role in exacerbating that rivalry by posting YouTube videos disrespecting the Oak Park Bloods. There was significant evidence that Haywood also was a member of the GMobb gang. Accordingly, there is sufficient evidence to support the true finding that defendant was carrying the .40-caliber hand gun for the benefit of a street gang. That he also may have been carrying the gun for personal protection does not preclude such a finding.

### III. DISPOSITION

The trial court shall correct the abstract of judgment to indicate the conviction on count three was the result of a jury verdict. In all other respects, the judgment is affirmed.

/S/

---

RENNER, J.

We concur:

/S/

---

BLEASE, Acting P. J.

/S/

---

HULL, J.